

**IN THE SUPREME COURT**  
**APPEAL FROM THE COURT OF APPEALS**

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**PAUL DRESSEL and THERESA  
DRESSEL,**

Plaintiffs-Appellees,

v

**Docket No. 119959**

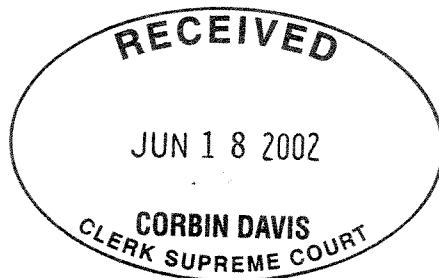
**AMERIBANK,**

Defendant-Appellant.

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**THE HUNTINGTON NATIONAL BANK'S AND ROCK FINANCIAL'S AMICI CURIAE  
BRIEF IN SUPPORT OF APPELLANT'S BRIEF ON APPEAL**

BODMAN, LONGLEY & DAHLING LLP  
Attorneys for The Huntington National  
Bank and Rock Financial, Inc.  
Lloyd C. Fell (P13359)  
James J. Walsh (P27454)  
George G. Kemsley (P23014)  
Sandra L. Jasinski (P37420)  
229 Court Street, P.O. Box 405  
Cheboygan, Michigan 49721  
(231) 627-4351



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## **STATEMENT OF RELIEF SOUGHT**

The Huntington National Bank and Quicken Loans (formerly Rock Financial, Inc.) (collectively, “amici”) support AmeriBank’s Appeal from the August 3, 2001 decision of the Court of Appeals reversing the July 12, 1999 decision of the Kent County Circuit Court granting AmeriBank’s Motion for Summary Disposition. Amici support AmeriBank’s request for reversal of the Court of Appeals’ decision and reinstatement of the judgment of the Circuit Court dismissing the action.

## STATEMENT OF QUESTIONS INVOLVED

1. The Court of Appeals held that AmeriBank was illegally “practicing law” under a 1917 Act (now MCL 450.681) because its various charges to its borrowers included a fee for preparing the promissory notes and mortgage instruments, even though AmeriBank was the lender in the mortgage loan transaction. The Court of Appeals even failed to cite a 1937 decision of this Court, decided under the 1917 Act, that the drafting by a contracting party of the necessary agreements and related documents (however complex) is a routine part of business and not the unauthorized practice of law. Instead, the Court of Appeals relied on cases that did not involve the 1917 Act and in which the defendants were brokers, not parties to the principal contract. Did the Court of Appeals err by ignoring the controlling Supreme Court authority?

Appellant AmeriBank: “Yes.”

Plaintiffs-Appellees: “No.”

Court of Appeals: “No.”

Amici: “Yes.”

2. Since 1937, this Court has held that a party does not engage in the unauthorized practice of law when it prepares documents for its own business transactions. Since 1937, this Court has not prohibited parties from collecting charges for such document preparation services. For decades, the State Bar has not challenged the well-known practice of financial institutions collecting charges for document preparation services. If this Court affirms a decision that overrules 65 year-old precedent, would it be manifestly unjust to retroactively apply that decision?

Appellant AmeriBank: Appellant AmeriBank did not consider this issue.

Plaintiffs-Appellees: Plaintiffs-Appellees did not consider this issue.

Court of Appeals: The Court of Appeals did not consider this issue.

Amici: “Yes.”

## **STATEMENT OF BASIS OF JURISDICTION**

In an Order dated April 23, 2002, this Court granted AmeriBank's Application for Leave to Appeal. Jurisdiction is based on MCR 7.301(A)(2).

## **STATEMENT OF FACTS AND MATERIAL PROCEEDINGS**

Amici adopt AmeriBank's Statement of Facts and Material Proceedings in Appellant's Application for Leave to Appeal.

## INTRODUCTION

Huntington National Bank and Quicken Loans (formerly Rock Financial, Inc.) each have been sued in complaints containing allegations similar to those in the complaint filed against AmeriBank, the Appellant in this litigation. This is not surprising for at least two reasons. First, the same attorneys are representing plaintiffs in all of those cases. Second, the mortgage and note forms used by all three institutions are the standardized forms published jointly by the Federal National Mortgage Association (FNMA or Fannie Mae) and the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac). Financial institutions make mortgage loans to prospective homeowners, using the standardized forms, and then sell the mortgages on the secondary market, which is dominated by Fannie Mae and Freddie Mac.

\*\*\* This secondary market permits primary lenders to sell their loans, and thereby obtain the cash with which they may make new loans. In this manner, the secondary market provides a constant source of funds and stabilizes the availability of loans to targeted groups of borrowers such as farmers, students and homeowners.” Lavargna, “Government Sponsored Enterprises Are ‘Too Big to Fail’: Balancing Public and Private Interests”, 44 Hastings Law Journal 991, 998-999 (1993).

In determining whether financial institutions are practicing law when they use these standardized forms, it will be useful at the outset for the Court to see a sample of the forms. Attached as Exhibit A is the note signed by the plaintiffs in the *Krause* case against Huntington, which is “Multistate Adjustable Rate Note – ARM 5-2 – Single Family – FNMA/FMLMC Uniform Form 3502-3/85”. For the corresponding mortgage, “Michigan-Single Family – FNMA/FHLMC Uniform Instrument Form 3023 9/90”, see Exhibit B.

These forms represent only a small part of the voluminous documentation a present day mortgage requires, as anyone who has obtained a mortgage recently knows. For example, Huntington Bank’s closing file for the *Krause* mortgage loan contained 261 pages. We ask the Court to keep these realities in mind as it considers whether a bank engages in the unauthorized

practice of law when it uses the required forms and charges some document preparation fee to borrowers.

## **ARGUMENT**

### **A. STANDARD OF REVIEW**

Amici adopt the Standard of Review set forth in AmeriBank's brief.

### **B. THE COURT OF APPEALS COMMITTED CLEAR LEGAL ERROR IN REVERSING THE CIRCUIT COURT'S DECISION IN FAVOR OF APPELLANT.**

#### **1. THE PREPARATION BY A PARTY TO A BUSINESS TRANSACTION OF CONTRACTS AND DOCUMENTS NECESSARY TO CONSUMMATE THE TRANSACTION IS AN ORDINARY PART OF BUSINESS AND DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.**

The Court of Appeals committed reversible error and failed to follow controlling precedent from this Court when it held that AmeriBank engaged in the unauthorized practice of law because it charged a fee for document preparation services in connection with the mortgage loan it made to Plaintiffs.

The Court of Appeals held that AmeriBank's conduct violated MCL 450.681, a specific criminal statute generally prohibiting the practice of law by corporations.<sup>1</sup> The Court of Appeals

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<sup>1</sup> MCL 450.681 is identical to 1917 PA 354. As with similar protective legislation passed in a number of other states, the 1917 Act was modeled, with only slight modifications, after a New York statute enacted to prevent publicly traded corporations from hiring attorneys and through them delivering legal services to the public in competition with lawyers practicing individually or in small partnerships. Note, *The Practice of Law by Corporations*, 44 Harvard L Rev 1114, n2 (1931). The soulless corporation was not thought to be a suitable vehicle for delivering legal services. *In re Co-Operative Law Co*, 198 NY 479, 92 NE 15 (1910). Michigan's 1917 Act and its sister acts in other states had little to do with protecting the public, but much to do with protecting the legal profession from competition. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice of Law Provisions*, 34 Stanford L Rev 1, 6-11 (1981).

was led into this error by Plaintiffs.<sup>2</sup> Notably absent from every appellate brief filed by Plaintiffs, including their brief in opposition to AmeriBank's Application for Leave to Appeal, is a citation to, much less a discussion of, MCL 450.681.

The preparation by a party to a transaction of contractual and other documents needed to consummate its own transaction with another is a routine part of business and has never been viewed in Michigan as the practice of law, regardless of the complexity of the documents. This settled principle clearly permits mortgage lenders to do what AmeriBank did in this case and what mortgage lenders such as amici do in their mortgage transactions. As the lenders in the mortgage transactions, amici can prepare necessary contract documents (regardless of complexity) for their mortgage loans. As shown in the next section, those documents include standard form mortgages and promissory notes.

The controlling case in Michigan is *Detroit Bar Ass'n v Union Guardian Trust Co.*, 282 Mich 216; 276 NW2d 365 (1936). The Court of Appeals in *Dressel* does not mention, much less discuss, this important decision. In *Union Guardian*, this Court rejected the State Bar's effort to enjoin a trust company from drafting certain kinds of non-testamentary contractual trust instruments to which the trust company itself would be a party:

[D]efendant points out that trust agreements which are revocable by the trustor and which do not contain provisions of donative or testamentary intent are **mere agreements between the contracting parties fixing their respective rights and duties, that drafting such agreements in no way constitutes the practice of law**, and does not involve conduct on the part of the respective parties over which courts have judicial control. **We think defendant's contention is sound.** Within the limitations indicated, **drafting trust agreements is no more the practice of law, nor does it any more contemplate action in or by the courts, than does the ordinary run of agreements in the every day activities of the commercial and industrial world.** A construction agreement may be considered as a fair example. If the contract project is of any magnitude it involves the making, the adoption, the interpretation and the execution of plans and specifications. It is a

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<sup>2</sup> Likewise, without the benefit of briefing, the Court of Appeals also held that AmeriBank's conduct violated an amendment to the Michigan Consumer Protection Act, MCL 445.901 *et. seq.*, that did not become effective until two years after the class period.

matter of common knowledge that often, and perhaps usually, these details are of such a complex and technical character as not to be understood readily by the property owner who is a party to the construction contract. **Nonetheless his right to enter into such a contract cannot be questioned nor is it requisite that it be drafted by one skilled in that field.** The same may be said of trust agreements of the limited character which the defendant is now contending that it has the right to solicit, draft and consummate with prospective trustors.

282 Mich at 228-229 (emphasis added).

In reading *Union Guardian*, it is important to note two factors. First, by definition, the trust instruments prepared by the trust company were also to be signed by the settlors of the trusts, and construction contracts prepared by a contractor would also be signed by property owners. The fact that there would be other contracting parties did not affect this Court's reasoning. Second, there is no suggestion in *Union Guardian* that a trust company or a construction company must structure their agreements so that they would receive no money from the other contracting parties to compensate for the permissible act of preparing their own contract documents.<sup>3</sup>

*Grand Rapids Bar Ass'n v Denkema*, 290 Mich 56; 287 NW 377 (1939), decided just two years after *Union Guardian*, is the only later case in which this Court actually considered the application of unauthorized practice of law concepts to a contracting party. In *Denkema*, an

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<sup>3</sup> *Union Guardian* presented three issues, the second of which was whether drafting trust agreements was the unauthorized practice of law. In connection with this issue, there is no mention of a separate fee or charge in the Supreme Court's opinion. The only reference to fees is in connection with the third issue, whether defendant trust company could prepare and present papers in probate court. 282 Mich at 230-234. The plaintiff argued that the defendant trust company, by preparing papers for filing in probate court, engaged in the unauthorized practice of law, "regardless of whether direct compensation is or is not received for services so rendered." *Id.*, 232. This Court held otherwise, "provided that for the rendering of such services it made no charge other than that of the fees provided by statute." *Id.*, 234. This observation is understandable because at that time fees for certain fiduciary services were fixed by statute and this Court had several times limited fiduciaries' efforts to enhance fiduciary fees by such devices as characterizing normal fiduciary activities like "drafting receipts" as legal services, *In re Pritchard's Estate* 255 Mich 545; 238 NW 270 (1931), or charging commissions on the sale of property, *In re Thompson's Estate*, 183 Mich 618; 150 NW 318 (1915).

injunction was sought against a defendant who maintained a business that was active in many areas, including drafting leases, deeds and mortgages for others. The defendant testified that among other things, he prepared notes and mortgages for **both** mortgage loans where he was the lender and loans where he was not a party. His testimony compared the income he derived from preparing papers for others' transactions (a "large part") and the income he derived from preparing papers for his own loans. *Denkema*, 290 Mich at 60. The trial court enjoined Mr. Denkema from "preparing **for others** legal instruments incidental to the sale, leasing or mortgaging of real property, **except in cases in which he is one of the parties in interest.**" *Id.*, 61, (emphasis added). As modified by this Court on appeal, Mr. Denkema was enjoined from:

Preparing **for others**, legal instruments incidental to the sale, leasing, or mortgaging of real property, (except under the supervision of an attorney and counselor at law, duly and legally authorized to practice law in Michigan; provided you do not advise or counsel as to the legal effect and validity of such instrument; **or when you are one of the parties in interest**). (Emphasis added).

Neither the trial court nor this Court enjoined Mr. Denkema from preparing documents for transactions in which he was a party in interest or from charging a fee for doing so. Thus, this Court relied on *Union Guardian* to **permit** Mr. Denkema **to continue preparing contracts to which he would be party**, only enjoining Mr. Denkema from preparing documents **for others** in transactions where he was **not** a party, and implicitly permitting him to continue to charge for those activities where he was a party to the transaction.

No subsequent cases limit or modify *Union Guardian* or *Denkema*, cases that remain good law in Michigan. The Court of Appeals completely ignored *Union Guardian* in its holding that the collection of a charge by a contracting party somehow transforms the fully permissible act of documenting a transaction into the unauthorized practice of law.

While the legislature has passed two statutes addressing the unauthorized practice of

law,<sup>4</sup> the legislature has not attempted to define what constitutes the “practice of law.” Under Const 1963, art 6, §5, this responsibility is delegated to this Court. In *State Bar of Michigan v Cramer*, 399 Mich 116, 132; 249 NW2d 1 (1976), this Court made these comments regarding the “formidable task of constructing a definition of the practice of law”:

We are still of the mind that any attempt to formulate a lasting, all-encompassing definition of [the] practice of law is doomed to failure for the reason that under our system of jurisprudence such practice must necessarily change with the ever-changing business and social order.

No essential definition of the practice of law has been articulated and **the descriptive definitions which have been agreed upon from time to time have only permitted disposition of specific questions.** These definitions have been relatively helpful in counseling conduct but have provided no sure guide for the public’s protection. *Id.* at 133 (quoting *Denkema*, 290 Mich at 64).

In claiming that mortgage lenders are prohibited from charging for document preparation services, Plaintiffs are trying to graft onto Michigan law a restrictive interpretation of the practice of law which has never been followed in Michigan and, even if it had been, would have no place in modern business transactions. Lay people routinely prepare documents with legal significance, such as employment and insurance contracts, leases, purchase offers, checks, bills of sale and the like in connection with business transactions where they or their employers receive consideration from the other contracting party. It would be utterly inconsistent with *Union Guardian*, and would create an intolerable burden on business practices, to hold that such persons are engaged in the unauthorized practice of law.

## **2. PREPARATION OF LOAN DOCUMENTS IS AN INDISPENSABLE PART OF MORTGAGE LENDING.**

It is important to recognize what is not pleaded or argued by Plaintiffs in this case. Plaintiffs do not allege that AmeriBank was in the business of preparing documents for loans that

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others may have made. None of the mortgage lenders named as defendants in *Dressel* and the many parallel lawsuits is in the business of preparing documents for sale to the general public. They are in the business of mortgage lending. They prepare documents solely for their own transactions. They do not hold themselves out as being document preparation companies.<sup>5</sup> The documentation they prepare -- including the promissory note and the mortgage instrument -- is indispensable to the business of making mortgage loans. Even the most uncomplicated mortgage loan requires the generation of a wide array of documents that must be signed, initialed, witnessed and/or notarized. Simply put, if the documentation is not prepared, the mortgage loan cannot be made. Without documentation, lenders such as AmeriBank and amici cannot do business. The Court of Appeals appeared to recognize this obvious fact and acknowledged that the preparation of documents by mortgage lenders for transactions in which they are involved is acceptable because it is “incidental to their business.” *Dressel*, at 3-4.

Although it pronounced that document preparation was acceptable when “incidental” to the lending activity, the Court of Appeals held that the collection of a fee for document preparation was sufficient to convert permissible document preparation into the impermissible unauthorized practice of law. To the Court of Appeals' way of thinking, the fact that a fee, however small, was collected meant the document preparation was not “incidental” to a loan transaction but, rather, a “service” to the borrower.

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<sup>4</sup> MCL 600.916 prohibits the practice of law by unlicensed individuals and makes violation punishable by contempt. MCL 450.681 prohibits the practice of law by corporations and makes violations punishable as misdemeanors.

<sup>5</sup> There are companies that sell document preparation services. AmeriBank and other lenders, however, are not among them. In criticizing the amount of the charges assessed by lenders such as AmeriBank, Plaintiffs' counsel have often referred to the lower fee structures of some of the stand-alone document preparation services available.

If the preparation of the mortgage documents for Defendant's customers was not a service, but rather incidental to its business as Defendant claims, then there would be no basis for the separate charge to Defendant's customers.

*Dressel*, at 5-6.

The Court of Appeals got it wrong in at least three respects: there is nothing "incidental" about the relationship of the business of mortgage lending and the activity of preparing notes and mortgages; the preparation of the note and mortgage is not a "service" to the borrower; and the collection of a fee directly connected to a lender's central business activity cannot transform conduct that the Court of Appeals acknowledges is permissible into the unauthorized practice of law.

It is misleading to describe document preparation as "incidental" to AmeriBank's business. Because a lender cannot make a mortgage loan without a note and without a mortgage instrument, the preparation of such documents is a necessary part or "incident" of the mortgage lending business.<sup>6</sup> But it is not an optional activity as the word "incidental" might suggest. By contrast, in the broker cases, the challenged activity truly was "incidental" to the brokerage business in that the parties to the sale contract or their attorneys could have prepared the deeds and conveyance documents without the broker's voluntary assistance.<sup>7</sup>

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<sup>6</sup> The Office of Thrift Supervision ("OTS") and the Office of the Comptroller of the Currency ("OCC") are the federal regulatory bodies charged with supervising national banks and federal thrifts. Briefs filed by OTS and OCC in other states, strongly dispute the assertion that document preparation is a tangential part of the lending operations of their constituencies. Rather, OTS describes document preparation as "an integral part of a [federal savings associations's] lending operations." See Exhibit C, Brief filed by OTS in *Etter v Citibank*, F.S.B., p. 2. Likewise, OCC, in addition to observing that national banks have the authority "to prepare the documents necessary to effect their own transactions," has stated that document preparation "is [i]nherent and essential to that business." See Exhibit D, brief filed by OCC in *Wenzel v Citicorp Mortgage, Inc.*, p. 2.

<sup>7</sup> This distinction has been noted by a court deciding a case under a statute similar to MCL 450.681. In *State v Pledger*, 257 NC 634, 127 SE2d 337 (N Car, 1962), the court reversed the conviction of an employee who prepared deeds of trust for his homebuilder employer

In no other context does the collection of a fee determine whether activities constitute the practice of law. A lawyer gratuitously offering legal advice at a social function is nevertheless acting as a lawyer, and the conduct is legal. A layman who purports to offer legal advice may offend the statute. An admitted lawyer who collects a charge for business advice (or for cutting lawns for that matter) is not providing legal services. A non-lawyer, such as a court clerk, who advises litigants gratuitously on legal matters is engaging in the unauthorized practice of law. A party to a commercial for-profit transaction who prepares the necessary contract documents is not practicing law merely because the transaction is profitable.<sup>8</sup> In each case, the propriety of the conduct should be measured by what is done, not by what is charged.

AmeriBank's loan to Plaintiffs was just one more of those routine business activities that occur every day. Like thousands of other mortgage lenders, AmeriBank and amici prepare large bundles of documents that are necessary to make and close a loan, including the promissory note and mortgage. Each lender charged a fee for document preparation services that was disclosed in advance. Under *Union Guardian*, it is perfectly permissible for AmeriBank (and other mortgage lenders) to prepare the necessary documents for its own mortgage loans. That AmeriBank makes money in the process, either by its overall margin or by disclosing and collecting a charge for the document preparation activity, does not affect the legality of its conduct. It did not engage in the

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because the builder had a “**primary interest**, not merely an incidental interest” in the sale transaction and “may prepare the legal documents necessary to the furtherance and completion of a transaction.

<sup>8</sup> The position of OTS and OCC is that financial institutions should, indeed they must earn a profit on document preparation activities, and that a lender's viability would be adversely affected if it was compelled to comply with a state law precluding it from earning a profit. See Appendix at C (“[Federal savings associations] are for-profit businesses and should not be compelled by state law to provide services for free.” See also, Appendix at D (“National banks are charged with the authority to engage in the ‘business of banking’ which cannot be separated from the authority to seek a return from those activities.”)

unauthorized practice of law; it did not violate MCL 450.681 or MCL 600.916. It did no more than engage in the perfectly legal business of mortgage lending.

That the necessary activity of document preparation is just part of the lending business and not obviously the “practice of law” or “unauthorized practice of law”<sup>9</sup> is underscored by the vast number of lawyers, and presumably Supreme Court Justices and State Bar officials, who have paid the document preparation fee for their own mortgage loans, or approved it for clients’ loans, without any fear that they were “assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law,” or that by doing so they were somehow in violation of MRPC 5.5(b).

**3. THE BROKER CASES ARE NOT CONTROLLING ON WHETHER AMERIBANK OR OTHER LENDERS CAN PROPERLY PREPARE MORTGAGE DOCUMENTS FOR USE IN ITS MORTGAGE LOANS AND CHARGE FOR THESE SERVICES.**

In addition to *Union Guardian* and *Denkema*, the briefs have discussed *Ingham County Bar Ass’n v Walter Neller Co*, 342 Mich 214; 69 NW2d 713 (1955) and *State Bar of Michigan v Kupris*, 366 Mich 688, 116 NW2d 341 (1962). It is dicta from these “broker” cases on which the Court of Appeals improperly relied in *Dressel*. Unlike *Union Guardian* and *Denkema*, neither *Walter Neller* nor *Kupris* involved the preparation of documents by a party to a transaction. Rather, both cases involved allegations of unauthorized practice of law based upon document preparation by real estate brokers who by definition were **not** parties to the contracts which they prepared.

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<sup>9</sup> The “practice of law” and the “unauthorized practice of law” are not two sides of a coin. Many activities that lawyers engage in as part of their daily practice may also be engaged in by non-lawyers without fear of prosecution. When the activities involve knowledge of legal matters, the most basic test is whether the person is acting for himself or for others. The former is not the practice of law; the latter can be, depending on other circumstances that need not be fully explored in this case, because, of course, AmeriBank was acting for itself.

In *Walter Neller*, decided in 1955, this Court rejected an appeal by the local and state bar associations from the circuit court's refusal to enjoin a real estate broker from filling out standard forms such as offers to purchase, deeds, land contracts, etc., to facilitate the closing of real estate transactions. This Court held such activities were permissible. During the proceedings, in arguing that its activities were only "incidental" to its brokerage business, the broker emphasized that it had not made a separate charge for filling out the documents that the buyer and seller would use for their contract. *Walter Neller*, 342 Mich at 217. The issue the parties framed for this Court incorporated that assumption. *Id.*, 219. Thus, whether the broker could charge a fee for preparing documents was not at issue and the opinion is silent on how the charging of a fee could convert a permissible business practice into the practice of law.<sup>10</sup>

*Kupris*, decided in 1962, was an attempt by the State Bar to revisit the holding of *Walter Neller*. Mr. Kupris acted as broker in a property sale. Later, however, when the purchasers decided to resell the property, Mr. Kupris exceeded the role brokers were permitted to play under *Walter Neller*. Mr. Kupris, who was not even involved as broker in that subsequent sale, agreed

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<sup>10</sup> It is a "well-settled rule that statements concerning a principle of law not essential to the determination of the case are *obiter dictum* and lack the force of an adjudication." *Roberts v Auto-Owners Insurance Co.*, 422 Mich 594, 597-98; 374 NW2d 905 (1985). *Dictum* is binding only "if the Court's opinion demonstrates application of the judicial mind to the precise question adjudged." *People v Higuera*, 244 Mich App 429; 625 NW2d 444 (2001). That is not the case in *Walter Neller* or *Kupris*. Because the *Walter Neller* and *Kupris* Courts were not actually confronted with the question of whether permissible document preparation activities could be converted into unauthorized practice of law merely by reason of compensation, there was no thorough consideration of the subject, nor any sufficient "application of the judicial mind to the precise question" of the effect of separate compensation. The "fee" language in *Walter Neller* and *Kupris* merely reflected the facts in those cases. Even in cases involving real estate brokers or other third parties who prepare documents for other people's transactions, neither *Walter Neller* nor *Kupris* established binding precedent on the fee issue. Certainly, neither case overruled *Union Guardian* or *Denkema*, nor established any rules with regard to fees whether a party to a transaction prepares the contractual documents for the transaction.

to draft a form of consent to be executed by a chattel mortgagee in the prior sale, and he “charged the sum of \$100 for his services and advice.” 366 Mich at 690. Apparently the document prepared by Mr. Kupris was defective.<sup>11</sup> The Bar not only sought to enjoin Mr. Kupris from the clearly improper activity of preparing documents for transactions where he was neither a party nor a broker -- an injunction to which Mr. Kupris willingly stipulated -- but also sought unsuccessfully to enjoin him from drafting or completing standardized legal forms and instruments on real estate transactions where he was a broker. Rejecting the Bar’s appeal, this Court adhered to its holding in *Walter Neller*.

The Court of Appeals failed to recognize the essential differences between *Walter Neller* and *Kupris* and the facts presented in *Dressel*. Unlike the defendant brokers in those cases, a mortgage lender is not a third party attempting to facilitate the closing of a contract between others. *Walter Neller* and *Kupris* have no bearing on the questions of whether a party to a contract, such as a mortgage lender, may engage in the normal business activity of preparing documents for its own business contracts and whether it may charge for doing so. Those questions are answered by *Union Guardian* and *Denkema*, which hold that it is normal and permissible business conduct to prepare contract documents for the preparing party’s own business transactions. AmeriBank was a party to the loan transaction for which it prepared documents. Under such circumstances, AmeriBank’s document preparation activities and those of mortgage lenders, such as amici, are just normal business conduct, and are neither the practice of law nor the unauthorized practice of law.

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<sup>11</sup> There has never been an allegation by Plaintiffs in this case or in the series of other similar cases filed by Plaintiffs’ counsel against other lenders that the documents prepared by the lender are defective. Indeed, none of those cases has anything to do with the quality of the documents, but only with the question of compensation.

**4. RECENT DECISIONS BY OTHER STATE SUPREME COURTS ARE INCONSISTENT WITH THE COURT OF APPEALS' DECISION IN *DRESSEL*.**

The Washington Supreme Court has held that whether a fee is charged is not the decisive factor in unauthorized practice of law claims. In *Perkins v CTX Mortgage Company*, 969 P2d 93 (Wash, 1999), the court rejected the plaintiff's argument that a lay person's authority to prepare legal instruments turns on whether a fee is charged: "The rule remains that the nature and character of the service rendered, rather than the fact of compensation for it, should govern its classification and relation to the public interest." *Id.*, 97 (internal quotations and citation omitted). More importantly, the court went on to hold that "whether or not a fee is charged, lenders are authorized to prepare the types of legal documents that are ordinarily incident to their financing activities when lay employees participating in such document preparation do not exercise any legal discretion." *Id.*, 100. The court therefore affirmed a lower court's dismissal of claims that a mortgage lender engaged in unauthorized practice of law and violated Washington's consumer protection act by charging a document preparation fee.

In *Cardinal v Merrill Lynch Realty/Burnet, Inc*, 433 NW2d 864, 869 (Minn 1989), the Minnesota Supreme Court stated:

Common sense suggests, however, that charging a fee for services which include the preparation of ordinary documentation for a real estate transaction does not convert a practice not otherwise unlawful into the unauthorized practice of law. MLRB could well have chosen to increase its rate of commission to reflect what would amount to the additional drafting fee and thereby hide the cost. That it instead opted for disclosure and enumerated the routine services encompassed by the fee is not determinative.

To assert that whether conduct amounts to the unauthorized practice of law turns on what the actor calls the fee on the mere designation of the charge as a drafting fee is to exalt form over substance and to ignore the public welfare concerns.

The reasoning of *Cardinal* is persuasive. The advance disclosure of credit charges is legislatively encouraged.<sup>12</sup> In this case, Plaintiffs' attempt to convert the disclosure of a lawful act into the unauthorized practice of law is unprincipled and contrary to the public interest.

**C. IF *DRESSEL* IS NOT REVERSED, IT SHOULD ONLY BE APPLIED PROSPECTIVELY.**

If this Court either denies AmeriBank's appeal or affirms the Court of Appeals' decision, the order entered implementing this Court's decision should provide that *Dressel* should not be given retroactive effect.

Amici do not disagree that, as a general rule, appellate decisions are applied retroactively. This Court, however, has frequently recognized that this general rule is not cast in stone:

Although the general rule is that judicial decisions are given full retroactive effect, *Hyde v Univ of Michigan Board of Regents*, 426 Mich 223, 240; 333 NW2d 847 (1986), a more flexible approach is warranted where injustice might result from full retroactivity. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). For example, a holding that overrules settled precedent may properly be limited to prospective application. *Id.*

This Court adopted from *Linkletter v Walker*, 381 US 618; 85 SCt 1731; 14 LEd2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 US 97, 106-107; 92 SCt 349; 30 LEd2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988) (Griffin, J).

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<sup>12</sup> Federal laws and regulations including the Truth-In-Lending Act, 12 USC § 2601 *et seq.*, and the Real Estate Settlement Practices Act, 15 USC § 1601 *et seq.*, encourage but do not always require separate disclosure of the cost of the activities and expenditures considered to be integral and necessary parts of mortgage lending. One such cost identified by the federal laws and regulations is "document preparation." A lender can choose not to charge for such activities and instead be compensated through the interest rate. It would be ironic if a lender's choice to disclose the cost to it and to its customer of a particular service somehow made it illegal to provide the service or to collect the disclosed amount. We anticipate this issue will be treated more fully in amicus curiae briefs filed by industry groups.

*Pohutski v City of Allen Park*, 463 Mich 674, 696; 641 NW2d 219 (April 2, 2002). See also, *Lesner v Liquid Disposal Inc*, 449 Mich 894, 643 NW2d 553; 2002 Mich LEXIS 746 (2002).

If *Dressel* is allowed to stand, amici submit that it is a textbook example of the type of ruling that should be applied prospectively under the *Pohutski* standard. As discussed *supra*, *Dressel* abandoned *Union Guardian* and announced a new rule. The purpose of the new rule is prophylactic, not compensatory. The purpose of unauthorized practice of law determinations is to protect the public and there is no suggestion that the *Dressel* plaintiffs, or anyone else, has been “harmed” beyond the amount of the fee by the imposition of a document preparation fee.

Reliance on the *Union Guardian* rules has been extensive, with a majority of lenders charging document preparation fees in connection with thousands of mortgage loans. Finally, “unwinding” at least a portion of those transactions on the basis of a newly created rule will cause disruption to the administration of justice as other attorneys join those representing the *Dressel* plaintiffs in filing suit against mortgage lenders throughout the state.

For 65 years, *Union Guardian* has assured financial institutions that they can prepare documents for their own profitable business transactions without running afoul of the statute prohibiting the unauthorized practice of law. Subsequent decisions of this Court addressing unauthorized practice of law issues, most notably *Walter Neller* and *Kupris*, did not question, criticize or limit *Union Guardian*’s holding. For many years, federal statutes and regulations have specifically identified “document preparation” as a permissible charge in mortgage lending. Simply put, nothing in existing law presaged the Court of Appeals’ decision in *Dressel*. While amici maintain that *Dressel* “overrules settled precedent,” *Lindsey* at 56, even the Court of Appeals itself effectively recognized that its decision should not be applied retroactively:

Michigan case law has yet to declare specifically that charging a separate fee for the preparation of legal documents by a banking institution constitutes the unauthorized practice of law.

*Dressel* at 4.

It would be fundamentally unfair and manifestly unjust to penalize mortgage lenders who have reasonably relied on this Court's precedent in conducting their business activities by retroactively applying a decision that was unforeseeable.

### **CONCLUSION AND RELIEF REQUESTED**

Plaintiffs' effort to convert a routine residential mortgage loan transaction into the unauthorized practice of law by lenders must fail. The documents in these cases are standard forms prescribed by Fannie Mae or Freddie Mac for use in the nationwide secondary market in mortgage loans. A lender's filling in of the data concerning borrower identification, interest, term of loan, etc., does not rise to the dignity of the practice of law.

This Court's statement in *Cramer* bears repeating:

\*\*\* [A]ny attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the ever changing business and social order.' *Grand Rapids Bar Association v Denkema*, 290 Mich 56, 64; 287 NW2d 377 (1939).

\*\*\*

A broad definition of the 'practice of law' embraces virtually all commercial areas of human endeavor. This, of course, will not do.

"It cannot be urged, with reason, that a lawyer must preside over every transaction when written legal forms must be selected and used by an agent for one of the parties. Such a restriction would so paralyze the business activities that very few transactions could be expeditiously consummated \*\*\*." *State ex rel. Indiana State Bar Association v Indiana Real Estate Association*, 244 Ind 214; 191 NE2d 711 (1963)." *Id.*

Plaintiffs are trying to graft on to Michigan law a restrictive interpretation of the practice of law which has never been followed in Michigan and, even if it had been, would have no place

in modern business transactions. Plaintiffs' efforts should fail.

Were the Court to hold that lenders could not prepare or charge for the preparation of mortgages in notes in their own transactions, the lending industry in Michigan would face the incongruous situation where state chartered banks would be prohibited from such activities while national banks and federally chartered thrift institutions would be able to argue, based upon the relevant federal law as explained in the briefs filed by the OCC and the OTS, that federal law preempted such restrictions on those institutions. Let common sense prevail and permit financial institutions to continue to provide mortgage loans as they have been doing for decades.

Amici respectfully request that this Court reverse the holding of the Court of Appeals and reinstate the Kent County Circuit Court's decision.

Respectfully submitted,

BODMAN, LONGLEY & DAHLING LLP

By: Lloyd C. Fell / on w/ permission  
Lloyd C. Fell (P13359)  
James J. Walsh (P27454)  
George G. Kemsley (P23014)  
Sandra L. Jasinski (P37420)  
229 Court Street, P.O. Box 405  
Cheboygan, Michigan 49721  
(231) 627-4351  
Attorneys for The Huntington National  
Bank and Rock Financial, Inc.

June 18, 2002

## ADJUSTABLE RATE NOTE

(1 Year Treasury Index-Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

March 7, 1997

GRAND RAPIDS

Michigan

[Date]

[City]

[State]

0-14080 WINDHERE, WALKER

MI 49544

[Property Address]

## 1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 124,500.00 (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is FHB FIRST MICHIGAN BANK GRAND RAPIDS, A CORPORATION.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

## 2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of 8.6250%. The interest rate I will pay will change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

## 3. PAYMENTS

## (A) Time and Place of Payments

I will pay principal and interest by making payments every month.

I will make my monthly payments on the first day of each month beginning on May 1, 1997. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on April 1, 2027, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "maturity date."

I will make my monthly payments at 1241 E BELTLINE NE SUITE 200, GRAND RAPIDS, MI 49505-4501, or at a different place if required by the Note Holder.

## (B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. \$ 968.35. This amount may change.

## (C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

## 4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

## (A) Change Dates

The interest rate I will pay may change on the first day of April 1, 1998, and on that day every 12th month thereafter. Each date on which my interest rate could change is called a "Change Date."

## (B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the weekly average yield on United States Treasury securities adjusted to a constant maturity of 1 year, as made available by the Federal Reserve Board. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index."

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**(C) Notice of Default**

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

**(D) No Waiver By Note Holder**

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

**(E) Payment of Note Holder's Costs and Expenses**

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

**8. GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

**9. OBLIGATIONS OF PERSONS UNDER THIS NOTE**

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

**10. WAIVERS**

I and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

**11. UNIFORM SECURED NOTE**

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

**Transfer of the Property or a Beneficial Interest in Borrower.** If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by applicable law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

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AFTER RECORDING MAIL TO:  
FMB FIRST MICHIGAN BANK GRAND RAPIDS  
1241 E BELTLINE NE SUITE 200  
GRAND RAPIDS, MI 49505-4501

LOAN NO. 2500200228

[Space Above This Line For Recording Data]

07-1319228

### MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on March 7, 1997  
TONYA L KRAUSE, A SINGLE WOMAN

The mortgagor is

0-14080 WINDEMERE, WALKER

MI 49544

whose address is  
("Borrower").

This Security Instrument is given to FMB FIRST MICHIGAN BANK GRAND RAPIDS,  
A CORPORATION

which is organized and existing under the laws of THE STATE OF MICHIGAN, and whose address is  
1241 E BELTLINE NE SUITE 200, GRAND RAPIDS, MI 49505-4501 ("Lender").  
Borrower owes Lender the principal sum of One Hundred Twenty Four Thousand Dollars and no/100  
Dollars (U.S. \$124,500.00). This debt is

evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly  
payments, with the full debt, if not paid earlier, due and payable on April 1, 2027. This Security  
Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals,  
extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7  
to protect the security of this Security Instrument; and (c) the performance of Borrower's covenants and agreements  
under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, warrant, grant and  
convey to Lender, with power of sale, the following described property located in Kent  
County, Michigan:

LOT 36, HILSONDALE PLAT NO 2, ACCORDING TO THE RECORDED PLAT IN LIBER 20 OF  
PLATS. ON PAGE 46.

P.P. #70-10-01-280-006

which has the address of

0-14080 WINDEMERE

WALKER

[Street]

[City]

Michigan 49544

("Property Address");

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements,  
appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be  
covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to  
mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record.  
Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any  
encumbrances of record.

MICHIGAN-SINGLE FAMILY-FNMA/FHLMC UNIFORM INSTRUMENT  
ISC/CMDTMI/0491/3023(9-90)-L

PAGE 1 OF 6

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FORM 3023 9/90

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for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval which shall not be unreasonably withheld. If Borrower fails to maintain coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property in accordance with paragraph 7.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within 30 days a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

**6. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste on the Property. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

**7. Protection of Lender's Rights in the Property.** If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument; appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

**8. Mortgage Insurance.** If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in effect. If, for any reason, the mortgage insurance coverage required by Lender lapses or ceases to be in effect, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the mortgage insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the periods that Lender requires) provided by

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16. Borrower's Copy. Borrower shall be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) 5 days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

21. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

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VAP

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

MARK N. ETTER, individually and	)	
on behalf of all others similarly situated,	)	
	)	
Plaintiff,	)	No. 02 CH 2193
	)	
v.	)	Judge Siebel
	)	
CITIBANK, F.S.B.,	)	
	)	
Defendant.	)	

**AMICUS CURIAE BRIEF  
OF THE OFFICE OF THRIFT SUPERVISION  
IN SUPPORT OF DEFENDANT CITIBANK, F.S.B.**

The Office of Thrift Supervision ("OTS"), an office in the United States Department of the Treasury, submits this brief in accordance with the Court's Order, dated April 23, 2002, which authorized the filing of *amicus curiae* briefs on the issue of preemption.

**STATEMENT OF INTEREST OF THE *AMICUS CURIAE***

OTS has principal responsibility for regulating federally-chartered savings associations ("FSAs"), such as defendant Citibank, F.S.B. ("Citibank"). 12 U.S.C. §§ 1462a, 1463(a), and 1464. In exercising that authority, OTS has promulgated comprehensive regulations governing the lending operations of FSAs. Those regulations specifically occupy the field of regulating FSAs' lending practices.

In this action, the plaintiff, Mark N. Etter, alleges that Citibank charged him a \$100 fee for preparing the note and mortgage documents for a real estate loan that Citibank made to him. Comp. Paras. 2-4. He alleges that this conduct constitutes the unauthorized practice of law, Comp. Par. 7, and he seeks declaratory and injunctive relief, damages, and restitution. Simply stated, he wants to prevent Citibank from charging its customers a fee for preparing loan documents.

OTS has an interest in this case because the document preparation activities that the Complaint characterizes as the “unauthorized practice of law” are an integral part of an FSA’s lending operations and thus fall squarely within OTS’s plenary authority to regulate FSAs’ operations. In the Home Owners’ Loan Act (“HOLA”) Congress entrusted OTS, not the individual states, with responsibility for regulating FSAs’ banking practices, including their lending operations, and it directed OTS to give “primary consideration of the best practices of thrift institutions [including FSAs] in the United States” in performing its regulatory duties. 12 U.S.C. § 1464(a).

This regulatory framework provides for both stability and uniformity in the regulation of the nation’s FSAs. If Illinois law were deemed to establish special rules for loan document preparation fees charged by FSAs in Illinois, it would stand as an obstacle to the achievement of these Federal objectives and usurp the authority over FSAs that Congress conferred on OTS.

For these reasons, OTS, an agency of the United States, believes that it is in the public interest to file this *amicus curiae* brief in support of defendant Citibank.

## ARGUMENT

The courts have long held that Federal law preempts state law where the Federal law occupies the field. That principle directly applies to this case. The HOLA and the regulations OTS has issued under the authority of the HOLA establish a pervasive Federal regulatory framework for FSAs. This Federal framework wholly occupies the field of regulating the lending activities of FSAs, including the imposition of loan-related fees, such as fees for preparing the loan documents themselves. For this reason alone, Illinois state law is preempted insofar as it purports to prohibit FSAs from charging borrowers a fee for the preparation of loan documents, such as a loan note and mortgage.

Another well-established ground for Federal preemption of a state law is that the state law conflicts with Federal law. A conflict occurs, inter alia, when the state law in question poses an obstacle to the achievement of the objectives of Federal law. Illinois law, if applied as Etter urges, would pose an obstacle to the achievement of two Federal objectives concerning FSAs.

First, OTS regulations that authorize FSAs to make residential loans do not ban or restrict FSAs from imposing fees for loan documents that they prepare. In fact, OTS has recognized that FSAs are for-profit businesses and should not be compelled by state law to provide services for free.

Second, Etter's position would thwart the Congressional objective that OTS shall have exclusive responsibility for regulating the operations of FSAs, "giving primary consideration of the best practices of thrift institutions in the United States." 12 U.S.C. § 1464(a). Congress entrusted OTS, not the states, with responsibility to determine the best

practices for FSAs and to create nationally uniform rules. By establishing special rules for loan transactions in Illinois, the state law would stand as an obstacle to the achievement of this Federal objective.

I. THE HOLA AND OTS REGULATIONS TOTALLY OCCUPY THE FIELD OF REGULATING LOAN DOCUMENT PREPARATION FEES THAT FEDERAL SAVINGS ASSOCIATIONS CHARGE AND THEREBY PREEMPT ANY STATE LAW THAT PURPORTS TO REGULATE SUCH FEES.

The doctrine of Federal preemption, which has its roots in the Supremacy Clause of the United States Constitution,<sup>1</sup> nullifies state actions that venture into regulatory fields that the Federal government has occupied.<sup>2</sup> Applying this principle, the courts have consistently ruled that when the Federal government preempts by “occupying the field,” no state law can operate in the area.<sup>3</sup>

In the HOLA, Congress conferred on OTS responsibility to provide for the safe and sound operation of FSAs, and to fulfill this responsibility, Congress granted OTS plenary and exclusive authority to regulate all aspects of the operations of FSAs.<sup>4</sup> Recognizing the pervasiveness of this authority, the United States Supreme Court and other Federal courts have found that section 5(a) of the HOLA and implementing regulations of OTS (and OTS’s predecessor, the Federal Home Loan Bank Board

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<sup>1</sup> U.S. CONST. art. VI, cl. 2.

<sup>2</sup> Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982) (“de la Cuesta”).

<sup>3</sup> de la Cuesta, 458 U.S. at 153; Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 203-04 (1983). See also United States v. Locke, 529 U.S. 89, 111 (2000) (favorably citing de la Cuesta on the subject of field preemption).

<sup>4</sup> Sections 4(a) and 5(a) of the HOLA, 12 U.S.C. §§ 1463(a) and 1464(a), respectively.

("FHLBB")) preempt state laws that purport to regulate the "activities or operations" of FSAs.<sup>5</sup>

In describing the extent to which the HOLA gave the FHLBB regulatory authority over FSAs, a United States Court of Appeals has observed, "the regulatory control of the [FHLBB] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control . . . . The broad regulatory authority over the federal associations conferred upon the [FHLBB] by HOLA does wholly pre-empt the field of regulatory control over these associations."<sup>6</sup> Similarly, after reviewing OTS's authority under the HOLA and the case law, a Federal district court echoed the Ninth Circuit's conclusions, emphasizing that "[b]roader authority would be hard to imagine."<sup>7</sup>

Consistent with these categorical judicial rulings, another district court recently found that "Congress granted OTS plenary and exclusive authority to regulate all aspects of the operations of federal savings associations."<sup>8</sup>

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<sup>5</sup> de la Cuesta, 458 U.S. at 161; Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9<sup>th</sup> Cir. 1979), aff'd mem., 445 U.S. 921 (1980); FSLIC v. Kidwell, 716 F. Supp. 1315, 1316 (N.D. Cal. 1989), vacated in part on other grounds, 937 F.2d 612 (9<sup>th</sup> Cir. 1991) ("[I]t is clear that any state law 'purporting to address the subject of the operations' of a [FSA] is preempted by the FHLBB's regulations."); People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951) ("The [FHLBB] has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.").

<sup>6</sup> Stein, 604 F.2d at 1260. See also The Nat'l State Bank v. Long, 630 F.2d 981, 989 (3<sup>rd</sup> Cir. 1980) (quoting Stein on the FHLBB's pervasive regulatory control over FSAs). While Stein dealt with the authority of the FHLBB under section 5(a), Congress gave the OTS the same authority in section 5(a), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

<sup>7</sup> WFS Fin. Inc. v. Dean, 79 F. Supp.2d 1024, 1026 (W.D. Wisc. 1999) (OTS regulations preempted state law concerning operating subsidiaries of FSAs).

<sup>8</sup> Bank of America, et al. v. City and County of San Francisco, et al., 2000 WL 33376673, \*3 (N.D. Cal. June 30, 2000).

Lending functions are at the core of an FSA's operations. This activity is so central that, consistent with these judicial rulings, OTS has issued a regulation that occupies the entire field of regulating FSA lending operations. 12 C.F.R. pt. 560. This regulation has the same preemptive force as Federal statutes.<sup>9</sup> Thus, not only the HOLA but also 12 C.F.R. pt. 560 have a preemptive effect on Illinois law.

The regulation specifically states "OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation."<sup>10</sup> The regulation also provides illustrations of the types of state laws that § 560.2(a) preempts. These examples include, among other things, laws covering all loan-related fees (including initial charges) and laws concerning the processing and origination of mortgages.<sup>11</sup> The document preparation charges at issue are initial charges and the task of preparing the documents is part of the process of originating the loan.

These illustrations and the plain language of the regulation leave no doubt that the regulation preempts Illinois law to the extent that the state law prohibits Citibank from charging its borrowers a fee for preparing loan documents, such as the loan note and mortgage. Even if there were some ambiguity about the regulation's language -- and there is no ambiguity -- this Court must defer to OTS's interpretation. Indeed, the United States Supreme Court has repeatedly emphasized that an agency's interpretation of its

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<sup>9</sup> The Supreme Court has specifically held that "[f]ederal regulations have no less preemptive effect than federal statutes." de la Cuesta, 458 U.S. at 153.

<sup>10</sup> 12 C.F.R. § 560.2(a).

<sup>11</sup> 12 C.F.R. §§ 560.2(b)(5) and (10).

own regulation must be upheld unless it is plainly erroneous or inconsistent with the regulation.<sup>12</sup>

Further, OTS's conclusion that part 560 applies to the document preparation fees at issue here is consistent with OTS determinations in analogous situations. For example, OTS issued an opinion letter that addressed the question of whether the HOLA and part 560 preempted the California Unfair Competition Act ("UCA") when the UCA was applied to prohibit an FSA from charging a customer a demand-statement fee and a facsimile fee when the borrower paid off a mortgage loan. OTS found that these are loan-related fees, and concluded, "[a]ccordingly, to the extent that the UCA is being used to regulate the imposition of loan-related fees that are part of the [FSAs'] lending programs, the UCA is preempted."<sup>13</sup>

Significantly, the First District of the Appellate Court of Illinois, citing this OTS opinion, recently held that loan payoff statement fees are loan-related fees and are preempted under part 560.<sup>14</sup> Just as fees for preparing and transmitting loan statements are loan-related fees that are part of an FSA's lending program, so, too, are fees for preparing the loan note and mortgage.

In short, the plain language of § 560.2(b), opinions of OTS and the Appellate Court of Illinois, and common sense all compel the conclusion that the preemption rules

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<sup>12</sup> Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); Auer v. Robbins, 519 U.S. 452, 461 (1997); Christensen v. Harris County, 529 U.S. 576, 588 (2000). See also, Geier v. American Honda Motor Co., 529 U.S. 1913, 861, 883 (2000).

<sup>13</sup> OTS Op. Chief Counsel (March 10, 1999) at 16. See also Op. Chief Counsel (April 21, 2000) at 2-3, which reaffirmed the agency's conclusion that Sec. 560.2(b) preempts state laws that purport to impose limitations on such charges.

<sup>14</sup> Moskowitz v. Washington Mutual Bank, FA, No. 1-01-2982, 2002 WL 480645 (1<sup>st</sup> Dist. March 29, 2002).

in part 560 apply to state laws that purport to bar Citibank from charging the borrower a fee for preparing the loan documents. That should be the end of the preemption inquiry. As OTS said when it issued part 560, if the “type of law in question is listed in paragraph (b). . . the analysis will end there; the law is preempted.” 61 Fed. Reg. 50951, 50966.

The case cannot be salvaged from preemption by characterizing it as merely a complaint against the allegedly unauthorized practice of law. Assuming *arguendo* that charging a fee for preparing the note and mortgage constitutes the unauthorized practice of law, and that either the Illinois Consumer Fraud and Deceptive Practices Act (“ICFA”) or Illinois common law provides Etter with a claim for such activity (two questions that are beyond the scope of this brief), the state law nevertheless is preempted under part 560. As § 560.2(c) states, certain traditional areas of state law (and laws that further a vital state interest) are generally *not* preempted unless (1) they have more than an incidental effect on FSA lending operations, or (2) they are contrary to the purposes expressed in § 560.2(a). The Complaint’s approach contravenes both prongs of this regulation.

OTS explained when it issued part 560 that it added these two qualifications for the purpose of “identifying state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers.” 61 Fed. Reg. at 50966. In this instance, the Complaint aims the IFCA and Illinois common law directly at the lender-borrower relationship, by alleging that Etter has a claim under those laws for Citibank’s practice of charging a fee for preparing the loan documents. The Complaint

thus fits the precise concern that OTS expressed about state laws that are aimed at regulating the lender-borrower relationship.

Specifically, under Etter's approach, the state laws would have more than an incidental effect on the lending operations of an FSA. The term "incidental" means "happening by chance and subordinate to some other thing; peripheral."<sup>15</sup> While there are a number of circumstances in which a state law can have more than a chance or subordinate effect on the lending operations of an FSA, certainly one such circumstance is to impose a substantive state requirement directly on an activity that is central to the lending process. Indeed, the Moskowitz court concluded that the imposition of a substantive state requirement on an integral part of the lending process is not "incidental."<sup>16</sup> As in Moskowitz, that is precisely what the Complaint in this case seeks to do. It is an attempt to apply substantive state law directly to Citibank's lending practices and to bar a lending practice that OTS does not prohibit. In short, the state law, if applied as the Complaint alleges, would have more than an incidental effect on an FSA's lending operations, and therefore is preempted.

In addition, the state law, as the Complaint seeks to apply it here, also would thwart a key purpose of part 560. As Section II of this brief discusses in greater detail, if state law barred an FSA from charging for document preparation services that it rendered in connection with making a loan, the state law would undermine the Federal objective of permitting FSAs to exercise their lending powers in accordance with a uniform scheme of

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<sup>15</sup> Bryan A. Garner, A Dictionary of Modern Legal Usage at 430 (2d ed. 1995).

<sup>16</sup> Moskowitz, at \*4.

Federal regulation. The Moskowitz court reached the same conclusion with regard to the fees at issue in that case. Id.

In sum, the HOLA, the OTS regulations issued under the authority of the HOLA, and judicial decisions interpreting the HOLA leave no room for doubt that FSAs conduct their operations under a pervasive and exclusive Federal regulatory framework that occupies the field of regulating FSA lending operations in general and their loan document preparation fees in particular. This comprehensive regulatory framework necessarily displaces the ICFA and Illinois common law insofar as such laws purport to prohibit FSAs from charging fees to their loan customers for preparing the papers that document loans, such as loan notes and mortgages.

## II. ILLINOIS LAW IS PREEMPTED BECAUSE IT CONFLICTS WITH FEDERAL LAW BY STANDING AS AN OBSTACLE TO THE ACHIEVEMENT OF FEDERAL OBJECTIVES.

When state law conflicts with Federal statutes and regulations, the Federal law prevails. In determining whether a conflict exists, courts, including the United States Supreme Court, have ruled that a conflict occurs when the state law in question poses an obstacle to the achievement of the objectives of Federal regulations.<sup>17</sup>

In its de la Cuesta opinion, the Supreme Court applied this principle to a situation that is similar to the circumstances that this case presents. The Federal law in that case was an FHLBB regulation that permitted FSAs to include a “due-on-sale” provision in home mortgages. (These provisions generally permit the lender to require the borrower

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<sup>17</sup> de la Cuesta, 458 U.S. at 156, 159 (preempting state limitation on due-on-sale practices that conflicted with FHLBB regulation); see also First Fed. Sav. & Loan A’ssn v. Greenwald, 591 F.2d 417, 425-26 (1<sup>st</sup> Cir. 1979) (preempting Massachusetts law requiring payment of interest on tax escrow account that conflicted with FHLBB regulation).

to pay the full amount of the outstanding balance on the loan when the borrower sells the property.) The pertinent state law was a substantive legal principle adopted by the California Supreme Court that banned the enforcement of due-on-sale provisions except under limited circumstances, such as where there was a risk of default.<sup>18</sup> In holding that the FHLBB regulation preempted the state law, the Supreme Court found that the state law conflicted with Federal law because the state law stood as an obstacle to the achievement of Federal objectives (even though the FHLBB simply permitted but did not require the use of due-on-sale clauses).<sup>19</sup>

The same type of conflict exists here. Etter's claim that state law prohibits Citibank from charging its loan customers a fee for preparing the loan documents conflicts with the HOLA and OTS regulations. Specifically, 12 C.F.R. § 560.30 authorizes FSAs to make all loans allowed under the HOLA, including residential loans, subject only to the limitations identified in § 560.30 and "such terms, conditions, or limitations as may be prescribed from time to time by OTS by policy directive, order, or regulation. . ." § 560.30. Neither § 560.30 nor any other OTS policy directive, order or regulation prohibits FSAs from charging a fee for preparing loan documents. Indeed, OTS has recognized that FSAs are for-profit businesses and should not be compelled by state or local laws to provide services to customers for free.<sup>20</sup> In any event, an OTS regulation, § 560.2(b)(5), specifically prohibits states from imposing restrictions on such fees. Thus, to the extent that the state law is construed as prohibiting loan document

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<sup>18</sup> de la Cuesta, 458 U.S. at 148-49.

<sup>19</sup> Id. at 155-56.

<sup>20</sup> OTS Op. Chief Counsel (Nov. 22, 1999) at 10.

preparation charges, it directly conflicts with the HOLA and OTS regulations, and for this reason alone, Federal law preempts it.

Etter's position also thwarts the more general Congressional objective that OTS shall have exclusive responsibility for regulating the operations of FSAs, "giving primary consideration of the best practices of thrift institutions in the United States."<sup>21</sup> Congress entrusted OTS, not the states, with the task of determining the best practices for thrift institutions and creating nationally uniform rules, which, in this case, is that FSAs have the option of charging loan-related fees. Etter's interpretation, by establishing special rules for loan transactions in Illinois, stands as an obstacle to the achievement of that Federal objective. If one state can exercise jurisdiction over the fees that FSAs charge, then countless other state and local governments throughout the United States could do so as well. At least for loan-related fees, the important principle of uniform Federal regulation of FSAs would be lost. To prevent this usurpation of Federal authority by Illinois law, this Court should reject the assertion that the ICFA and Illinois common law bar FSAs from charging their loan customers a fee for preparing the loan note, mortgage, and other pertinent loan documents.

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<sup>21</sup> 12 U.S.C. § 1464(a).

## CONCLUSION

For the foregoing reasons, Federal law preempts the ICFA and Illinois common law insofar as those state laws are construed to prohibit FSAs from charging their loan customers fees for the preparing of the loan documents.

Respectfully submitted,

CAROLYN J. BUCK  
Chief Counsel

THOMAS J. SEGAL  
Deputy Chief Counsel

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P. STACY POWERS  
Regional Counsel  
Attorney No. 6181274  
Attorneys for *Amicus Curiae*  
Office of Thrift Supervision  
1 South Wacker Drive  
Suite 2000  
Chicago, IL 60606  
Telephone: (312) 917-5000  
Facsimile: (312) 917-5001

Dated: April 30, 2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

LILLI FETSCH WENZEL, )  
)  
Plaintiff, )  
)  
)  
v. )  
)  
CITICORP MORTGAGE, INC. )  
)  
)  
Defendant. )

No. 01 CH 18067  
Judge Nowicki

**FILED**

APR 30 2002

DOROTHY BROWN  
CLERK OF CIRCUIT COURT

AARON SAMPSON, )  
)  
Plaintiff, )  
)  
)  
v. )  
)  
CITIMORTGAGE, INC., )  
)  
Defendant. )

No. 01 CH 19912

**BRIEF AMICUS CURIAE OF THE OFFICE OF THE  
COMPTROLLER OF THE CURRENCY  
IN SUPPORT OF DEFENDANT**

**Interest of Amicus Curiae**

The Office of the Comptroller of the Currency ("OCC") respectfully submits this brief *amicus curiae* in support of defendant CitiMortgage, Inc. ("CMI"), which is an operating subsidiary of Citibank, N.A., a national bank. As the federal agency responsible for interpreting the National Bank Act and administering the national bank charter, including determining the scope of permissible national bank activities, the OCC has a particular interest and expertise in the issues raised by the litigation.

Citibank, N.A., engages in mortgage lending through CMI in accordance with OCC regulations that authorize national banks to carry out the activities permitted to them under federal law by means of separately incorporated subsidiaries. *See* 12 C.F.R. § 5.34.<sup>1</sup> Pursuant to this authority, CMI made loans to Plaintiffs to acquire residential real estate and secured those loans with a mortgage on the real estate. Plaintiffs allege that by charging a document preparation fee for preparing the note documenting the terms of CMI's loan and Plaintiffs' repayment obligation and a mortgage documenting CMI's security interest in the real estate, CMI engaged in the unauthorized practice of law.

At the outset, it is important to note that the OCC is not questioning the state's ability to regulate the substance of the practice of law conducted in the state. Rather, the question presented is whether, under recognized preemption standards, the authority of a national bank under federal law to document its own loan transactions and to charge a fee for that service preempts a state law that Plaintiffs seek to apply to prevent the bank from receiving that fee.

Making loans is at the heart of the business of banking authorized for national banks under federal law. Inherent and essential to that business is the authority of national banks to prepare documentation necessary for their own loan transactions. Also fundamental is that national banks are authorized under federal law to charge customers for the products and

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<sup>1</sup> The OCC regulation authorizing national banks to establish operating subsidiaries provides:

(e)(1) *Authorized activities.* A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking as determined by the OCC, or otherwise under statutory authority \* \* \*.

\* \* \*

(3) An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. \* \* \*

12 C.F.R. § 5.34(e).

services they provide. State laws cannot compel national banks to provide banking products and services for free.

The OCC has repeatedly endorsed the fundamental and unremarkable principle that national banks<sup>2</sup> are authorized, as a matter of federal law, to charge non-interest fees for the banking services that federal law authorizes them to provide. This principle, which reflects universal practice among American financial institutions, is codified in OCC's regulations and reflected in published Interpretive Letters. To the extent that Illinois law blocks the exercise of national bank powers authorized by federal law, the Supremacy Clause of the U.S. Constitution renders the state statute null and void.

Accordingly, the OCC submits this brief *amicus curiae* to present the federal interest at issue, which here coincides with the merits position taken by defendant CMI, that federal law authorizes national banks acting through operating subsidiaries to charge a fee for preparing loans documents related to their real estate lending activities.

## ARGUMENT

### THE NATIONAL BANK ACT AUTHORIZES NATIONAL BANKS TO CHARGE FEES FOR DOCUMENT PREPARATION SERVICES AND PREEMPTS CONTRARY STATE LAW

#### I. The National Bank Act Authorizes National Banks To Charge Document Preparation Fees in Connection with their Lending Activities

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<sup>2</sup> Throughout this brief, in describing the permissible activities of national banks, the descriptions apply equally to national banks exercising their powers through operating subsidiaries such as CMI. As noted above, a national bank is permitted to exercise the authorities granted under federal law through operating subsidiaries. Therefore, a national bank operating subsidiary receives the same treatment under federal and state laws as its parent bank absent federal law dictating a different result. See 12 C.F.R. §§ 5.34(e) (application of federal law to operating subsidiaries) and 7.4006 (application of state law to operating subsidiaries).

The statutory authority for national banks to conduct business comes from the National Bank Act, enacted in 1864. In addition to setting forth the framework for the creation, regulation, and operation of national banks, the National Bank Act governs the scope of "banking powers" -- *i.e.*, statutorily-authorized banking-related activities. Those powers include the authority: "To exercise \* \* \* all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt \* \* \*; by loaning money on personal security." 12 U.S.C. § 24(Seventh).

Federal law also explicitly empowers national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to \* \* \* such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371. Moreover, the OCC has specifically recognized that national banks may exercise their lending powers through operating subsidiaries. 12 C.F.R. § 5.34(e)(5)(v)(C) (making loans and other extensions of credit). Accordingly, the power of the national bank to engage in the business of making real estate loans through an operating subsidiary is textually explicit.

It is also beyond debate that national banks have authority to prepare the documents necessary to effect their own transactions. Recording and documenting deposits received, loans made, and other banking transactions are easily understood as a central element of the business of banking. A national bank's failure to properly document its transactions would be severely criticized by the OCC as an unsafe or unsound banking practice. *See* 12 C.F.R. Part 30, Appendix A, at ¶¶ II.C & D.

It is a fundamental principle that the authority conferred by federal banking law to provide a banking service carries with it the authority to charge for that service. National banks are private, for-profit enterprises, and not public utilities or common carriers, which must justify service charges to regulators. National banks are charged with the authority to engage in the "business of banking" (emphasis added), which cannot be separated from the authority to seek a business return from those activities. Any contrary rule would render national bank powers meaningless.

The Supreme Court has long recognized that national banks are private enterprises that are entitled to exercise National Bank Act powers inherent in the operation of the business of banking. In holding that the National Bank Act preempts a state restriction on national bank advertising, the Court stated: "Modern competition for business finds advertising one of the most usual and useful of weapons. \* \* \* It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-78 (1954); see *Bank One, Utah v. Guttai*, 190 F.3d 844, 850 (8<sup>th</sup> Cir. 1999), cert. denied sub nom. *Foster v. Bank One, Utah*, 529 U.S. 1087 (2000). It would be even more difficult to justify an interpretation that would permit national banks to engage in an activity but require them to do it for free.

The OCC has specifically addressed the authority of national banks to charge fees for the services they provide in rulemaking. See 66 Fed. Reg. 34,791 (July 2, 2001) (OCC regulation on national bank charges, codified at 12 C.F.R. § 7.4002). The OCC's regulation unambiguously provides that "[a] national bank may charge its customers non-interest charges

and fees, including deposit account service charges." 12 C.F.R. § 7.4002(a) (2002). The regulation further provides that "[t]he establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2). The regulation also identifies safety and soundness factors bearing upon a bank's decision to establish a fee, including the cost to the bank of providing the service and deterring misuse of banking services. *Id.*

In this case, CMI, making real estate loans as an authorized operating subsidiary of a national bank, charged a fee for preparing the notes and mortgages that documented the agreed upon terms of its loans to Plaintiffs and the security interests received in those transactions. Given that national banks have the legal power to make real estate loans, and to do so using operating subsidiaries, it follows that a fee may be charged for discrete services rendered in the process of making those loans: here, for preparing the documents needed to close the loan.

## **II. Any State Law Prohibiting Fees Authorized By The National Bank Act Is Preempted By Federal Law**

Under the Constitution's Supremacy Clause, when the federal government acts within the sphere of its authority, federal law is paramount over, and preempts, inconsistent state law. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). The nature and degree of disharmony between state and federal law that will trigger preemption has been expressed in a variety of formulations,<sup>3</sup> but has been usefully summarized as a question whether, under the circumstances of a particular case, the state law may "stan[d] as an obstacle to the

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<sup>3</sup> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Those principles have repeatedly been applied to invalidate state authority that would pose obstacles to the exercise of national bank powers.<sup>4</sup> The Court has observed that the history of Supremacy Clause litigation of national bank authority is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32.<sup>5</sup>

These principles are equally applicable in the context of state laws that would prohibit a national bank from charging fees authorized by federal law. Courts have repeatedly invalidated state and municipal efforts to prevent national banks from charging for the products and services they are authorized to provide under federal law. See, e.g., *Bank of America v. City and County of San Francisco*, 2000 WL 33376673 (N.D. Cal. 6/30/00), appeal pending, Nos. 00-16994 and 00-16355 (9<sup>th</sup> Cir.) (permanent injunction granted from two ordinances prohibiting charges of fees for ATM services); *New Jersey Bankers Ass'n, v. Township of Woodbridge*, No. 00-702 (JAG) (D.N.J. 11/8/00) (temporary restraining order entered blocking effectiveness of ATM fee prohibition adopted by Newark and Woodbridge); *Wells*

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<sup>4</sup> The Supreme Court established long ago that "the states can exercise no control over [national banks], nor in any way affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Merchants' Nat'l Bank v. Dearing*, 91 U.S. 29, 33-35 (1875). See also *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 256 (1966) (observing that "[t]he paramount power of the Congress over national banks has \* \* \* been settled for almost a century and a half"). See generally *Barnett Bank* (federal statute preempts state statute restricting bank sales of insurance); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

<sup>5</sup> It is immaterial to the application of this principle whether the federal power is explicit or implicit in the National Bank Act. *Barnett Bank*, 517 U.S. at 31; see *Franklin Nat'l Bank v. New York*, 347 U.S. at 375-79 & n.7. In any event, as noted, the power to make real estate loans is explicitly authorized by 12 U.S.C. § 371.

*Fargo Bank Texas, N.A. v. James*, No. AU: 01-CA-538-JRN (W.D. Tex. 12/3/01) (state officials permanently enjoined from enforcing state law prohibiting bank from charging fees to non-account holders for cashing checks drawn on that bank); *Metrobank, N.A. v. Foster*, 2002 WL 432069 (S.D. Iowa 3/6/02) (permanent injunction granted from state prohibitions against ATN access fees). The result here can be no different.

The statutory and regulatory bases of the authority for a national bank and its operating subsidiary to engage in real estate lending activities and charge a fee for services rendered in connection with that activity is clear and comprehensive. The result under the Supremacy Clause is also clear if Illinois law would bar a national bank from preparing, and charging for the preparation of, documents pertaining to its own loans - - activities that are clearly authorized under federal law. The Illinois law must yield to the paramount authority of federal law.<sup>6</sup> See *Barnett Bank, supra*; *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) (federal regulations issued under authority of federal law preempt contrary state law).

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<sup>6</sup> The same result was reached in *Chaires v. Chevy Chase Bank, F.S.B.*, 748 A. 2d 34 (Md. Ct. App. 2000), which involved loans made by a subsidiary of a federally chartered financial institution. After noting that the fees were authorized by regulations of the Office of Thrift Supervision, the Court held: "We find that all these charges are governed by the federal regulations and therefore the trial court properly granted summary judgment on the issue of federal preemption." 748 A.2d at 46.

## CONCLUSION

For the forgoing reasons, federal banking law would preempt an Illinois' prohibition on a charging a fee for preparing documents concerning a loan made by a national bank through its operating subsidiary.


Respectfully submitted,

JULIE L. WILLIAMS  
First Deputy Comptroller and Chief Counsel

DANIEL P. STIPANO  
Deputy Chief Counsel

L. ROBERT GRIFFIN  
Director of Litigation

ERNEST C. BARRETT, III  
Assistant Director of Litigation

  
CHRISTOPHER G. SABLICH  
Senior Counsel  
Illinois Bar # 6225986

Attorneys for Amicus Curiae  
Office of the Comptroller of the Currency  
250 E Street, S.W.  
Washington, D.C. 20219  
Tel: 202-874-5280  
Fax: 202-874-5279

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